UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C.

Southwest Regional Council of Carpenters, Respondent, and Kyle Hail, and individual, Charging Party, and Salvador Plascencia, an individual, Charging Party.	Case No. 28-CA-263565 & 28-CA-262458

RESPONDENT'S SOUTHWEST REGIONAL COUNCIL OF CARPENTERS ANSWERING BRIEF TO EXCEPTIONS

Submitted by:

Daniel M. Shanley, Esq.
dshanley@shanleyapc.com
Judy Kang, Esq.
jkang@shanleyapc.com
SHANLEY, Attorneys at Law
533 S. Fremont Ave., 9th Floor
Los Angeles, CA 90071
T: (213) 488-4100
F: (213) 488-4180

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Board Cases

Statutes

Other

I. Introduction

The year 2020 was marked by the Covid-19 pandemic. States were shut down and the economy crashed. The Southwest Regional Council of Carpenters ("SWRCC" or "the Council") was forced to make painful employment decisions to ensure the organization's continuing viability during the pandemic and its ability to serve the best interests of its members. The Council was forced to lay-off 20 employees due to the COVID-19 pandemic from across multiple states. Two bottom tier performers from Las Vegas—Kyle Hail and Salvador Plascencia ("Charging Parties")—were among the 20 laid-off.

The Charging Parties filed separate NLRB Charges against SWRCC. On November 30, 2020, a Consolidated Complaint and Notice of Hearing was filed. The Consolidated Complaint alleged a violation of Section 8(a)(1) of the Act based on the five allegations in paragraphs 4(a)-4(e). However, on April 21, 2021, the Region withdrew allegations 4(b) and 4(c).

The remaining issues are as follows: The Charging Parties claim that from about March 2020 through about May 2020, Hail and Plascencia engaged in concerted activities by raising concerns about employees' safety and working conditions in light of COVID-19 and bringing those concerns to SWRCC. (Complaint ¶ 4(a)). The General Counsel ("GC") alleged that the Charging Parties engaged in the following concerted activities: (1) they voiced concerns about their safety and the safety of others,[1] (2) they asked the Council to make COVID-19 testing available to the staff, and (3) they took the COVID-19 tests at the Raiders Stadium because the carpenters working at the Stadium were scared of taking the tests, and they wanted to lead by example. (Tr. 12:14-24). Allegedly, the Charging Parties were laid-off because they engaged in protected activities.

For the reasons discussed below, the ALJ correctly determined that the GC failed to establish by a preponderance of evidence that the Council laid off Charging Parties as a result of their protected concerted activities.

/ / /

/ / /

/ / /

[1] While the GC previously argued that Hail complained about the buffet lunches, this argument was abandoned and is now waived.

II. Statement of Unrefuted Facts and Findings Not Excepted to By The GC

A. The Southwest Regional Council of Carpenters

The United Brotherhood of Carpenters is divided into districts which are subdivided into regional councils. The SWRCC covers the states of Arizona, Utah, New Mexico, Colorado, Nevada and the southern part of California. The Council maintains suboffices in a number of locations including Denver, Albuquerque, Reno, Phoenix and Salt Lake City. (ALJD 2:21-26). The Las Vegas office is run by Frank Hawk, a Regional Vice-President and Chief Operating Officer. He is assisted by his brother Mike Hawk, a Regional Vice President, and Steven Dudley, the team leader of the business representatives. Frank Hawk reports to Daniel Langford, the Council's Chief Executive Officer in California. (ALJD 3:1-4).

B. Hail's Pre-Pandemic Performance

In May 2017, the Counsel hired Kyle Hail as a business representative. (ALJD 3:9). In 2018, Steven Dudley, Hail's immediate supervisor gave Hail a performance review which rated him as a "High Performer." (ALJD 3:12-13). By the end of the summer of 2019 that had all changed after Kyle Hail got caught misusing the Council's social media accounts to wage a personal vendetta against a local girls scout mom.

> Hail believed the leader of his daughter's Girl Scout troop had been very unfair in her dealings with Hail's wife and daughter. On August 3, 2019, on the Carpenters' social media Facebook page, he appealed to fellow Union members to render assistance to his family in this dispute by disparaging the woman's animal grooming service on Yelp. At least one Union member did so.

(ALJD, p.3, n.3).

Exhibit 70 evidence the consequences of Hails' improper social media actions:

/ / /

/ / /

/ / /

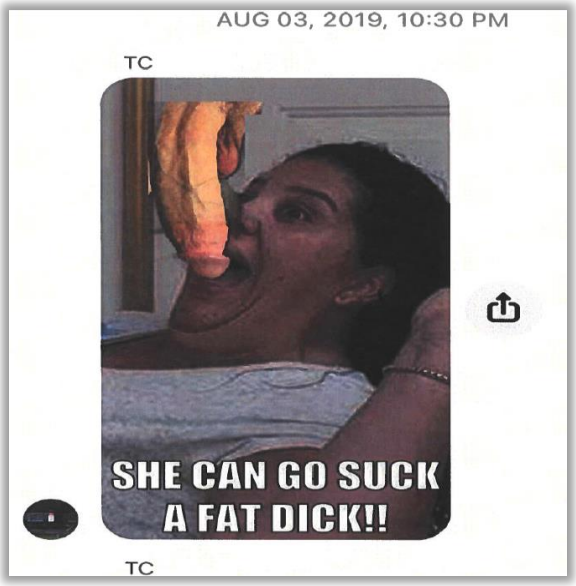
/ / /

/ / /

/ / /

/ / /

/ / /



Thereafter, in December 12, 2019 Frank Hawk sat down with Hail to discuss his job performance. On December 14, 2019, Hail printed out his 2018 performance because he rightly believed he was in danger of being terminated. (ALJD 3: 25-27). Kyle testified:

> Q And in December of 2019, you were afraid for your job?
> A I felt that I had been threatened, yes.

(Tr. 832:2-3).

Frank Hawk's dissatisfaction with Kyle Hail long preceded his alleged protected activity. (ALJD 4:8-10). Frank Hawk testified that he criticized many aspects of Hail's job performance, stated that the location of Hail's tattoos made it difficult for him to send Hail on certain types of assignments and that he was still angry about Hail's use of the Council-related Facebook page in a dispute he had with a Girl Scout troop leader. (ALJD 3:39-42). According to Frank Hawk, he told Hail, he would "have to pick up his game," Tr. 366-73. Hawk testified that Hail's job performance improved temporarily and then relapsed. (ALJD 4:1-4).[2]

C. The Pandemic

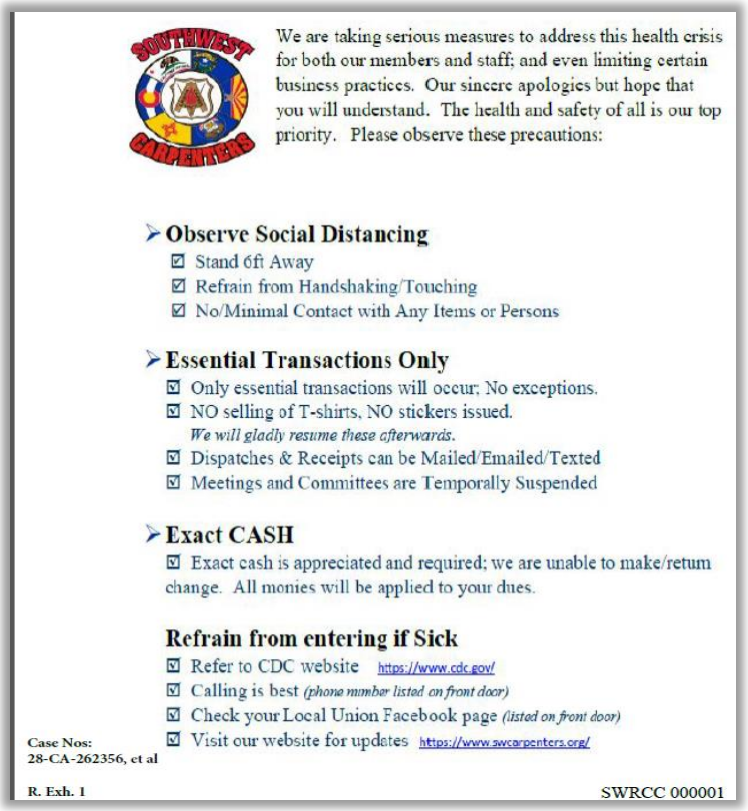
The year 2020 was marked by the covid pandemic, becoming the first pandemic in over 100 years. Uncertainty, confusion, and panic reigned. The government gave conflicting messages. Initially, the President said this was no worse than the flu and would quickly disappear.

[2] The Council only describes Plascencia's performance below because the ALJ did not make a specific finding as to Plascencia's job performance. He only made certain findings with respect to Hail's job performance prior to the pandemic.

On March 12, 2020, the Governor of Nevada declared a state of emergency due to the COVID-19 pandemic. By March 13, 2020, the President declared a national emergency. Beginning late March of 2020, numerous states shutdown their economies. Nevada followed suit. All non-essential activities were to cease. (ALJD 4:28-29). This included many of the activities which are the life-blood of the Las Vegas economy, such as gambling and trade shows. (ALJD 4:29-30). On March 20, 2020, the Governor issued the "Declaration of Emergency for COVID-19 – Directive 003." (SWRCC Exhibit 13). With the help of Frank Hawk, construction was deemed to be essential and continued. (Tr. 315:12-316:1 ["I['m] putting you in charge the – the safety of the construction industry, and it's up to you to keep it essential and I'll deem it essential."]). However, carpenter union members who worked in hotels were laid off. Trade show work came to a halt. Some construction projects were cancelled or delayed. (ALJD 4:31-33).

D. Council's Response

This record shows, for starters, that Respondent was far from indifferent regarding the exposure of its employees to COVID. It took many precautions to minimize the risk to these employees and union members generally. (ALJD 9:6-9). SWRCC instituted a number of new policies in light of the pandemic. Representatives were texted their assignments rather than getting them in person at the union hall. Representatives were also instructed not to ride to jobsites together and to maintain social distancing and to take other precautions, i.e., frequent hand washing, social distancing, etc. (ALJD 5:1-4).



We are taking serious measures to address this health crisis for both our members and staff; and even limiting certain business practices. Our sincere apologies but hope that you will understand. The health and safety of all is our top priority. Please observe these precautions:

Observe Social Distancing

- ☑ Stand 6ft Away
- ☑ Refrain from Handshaking/Touching
- ☑ No/Minimal Contact with Any Items or Persons

Essential Transactions Only

- ☑ Only essential transactions will occur; No exceptions.
- ☑ NO selling of T-shirts, NO stickers issued.
  We will gladly resume these afterwards.
- ☑ Dispatches & Receipts can be Mailed/Emailed/Texted
- ☑ Meetings and Committees are Temporally Suspended

Exact CASH

- ☑ Exact cash is appreciated and required; we are unable to make/return change. All monies will be applied to your dues.

Refrain from entering if Sick

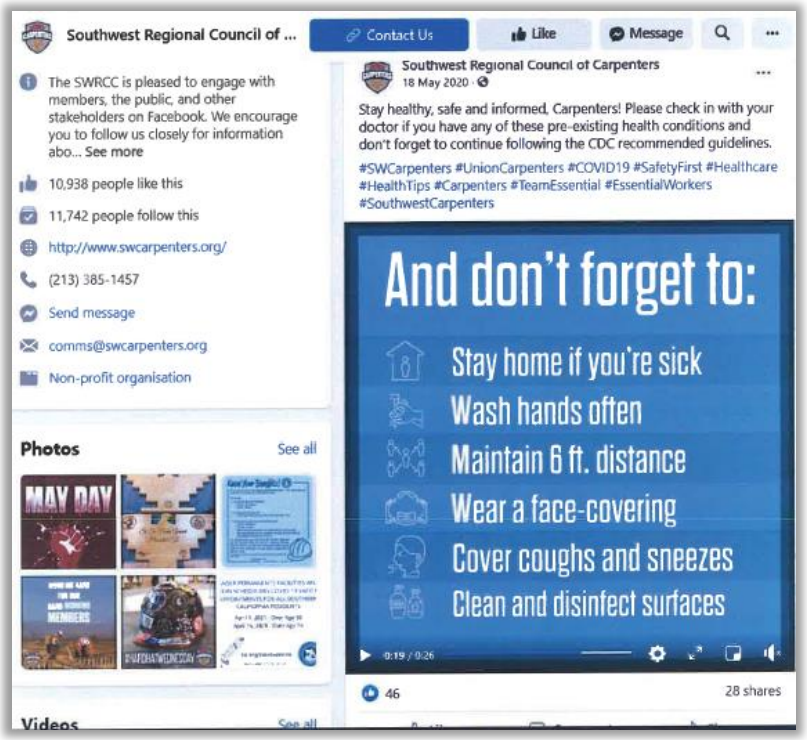
- ☑ Refer to CDC website https://www.cdc.gov/
- ☑ Calling is best *(phone number listed on front door)*
- ☑ Check your Local Union Facebook page *(listed on front door)*
- ☑ Visit our website for updates https://www.swcarpenters.org/

Case Nos:
28-CA-262356, et al

R. Exh. 1

SWRCC 000001

(SWRCC Exhibits 1 & 35). Business representatives were told to stay home if they were sick or had COVID symptoms. (ALJD 5:5; SWRCC Exhibit 39). Throughout the pandemic the Council continuously reminded its members and staff of its covid policies:



(SWRCC Exhibit 51; see also SWRCC Exhibits 37, 40, 41, 43, 48).

A. The Raiders Stadium and COVID Tests

A large construction project that continued through the pandemic was the construction of the Raiders Stadium. Starting on May 5, Steven Dudley assigned Hail and Plascencia to work together-often at the stadium. (ALJD 5:11-14). The Raiders Stadium saw a rise of positive covid cases "mostly localized in the team of electricians working on site." (SWRCC Exhibit 32). Mortenson/McCarthy requested the help of the Southern Nevada Health District in investigating the increase in positive cases.

As early as March 18, 2020, Nevada was experiencing supply shortages. (SWRCC Exhibit 28)[3]. This continued through April, (SWRCC Exhibit 29), and May. (SWRCC Exhibit 30). The tests were limited to only those seriously sick. (SWRCC Exhibit 29 ["Both facilities are testing only people with symptoms…"]). Despite the widespread shortage of covid testing supplies during the beginning of the pandemic, the Southern Nevada Health District was able to provide "targeted, voluntary on-site workforce testing during the week of May 4." (SWRCC Exhibit 32). The testing was provided Thursday, May 7 and Friday, May 8. (Tr. 57:17-19).

[3] The ALJ did not strike the Council's Request for Judicial Notice as requested by the GC. The GC did not except to this decision. Thus, any objection is now waived.

B. Economic Downturn

The Las Vegas economy was hit particularly hard by the COVID pandemic. (Tr. 320:15-19). Judge Amchan took "judicial notice of the fact that the Las Vegas economy is particularly dependent on gambling and you know, the tourism business," (Tr. 321: 2-3), and the Nevada economy tanked more than most other places in the country, and that there were job losses. (Tr. 321:3-6; SWRCC Exhibit 52).

The Council's finances are hour-based. The hours worked by members corresponds with the income and financial stability of the Council. (Tr. 328:7-19). Less dispatches means less hours worked and less dues paid which necessitates the tightening of the Council's budget. (Tr. 328:7-9; Tr. 328:22-25). By the end of March in Las Vegas, Frank Hawk was faced with, by a conservative measurement, at least a 66% drop of workers being dispatched. He did not know how long the shutdown and the downtrend would last.

Frank Hawk began considering the possibility of layoffs when the governor first announced the shutdown of Las Vegas Boulevard. (Tr. 331:21-25). He began working on the reduction in force chart. (Tr. 335:15-17; SWRCC Exhibit 23). The ALJ found that "there is no evidence contradicting Frank Hawk's testimony that he decided to layoff Hail and Plascencia in **April**…" (ALJD 10: 22-24)(emphasis added).[4]

C. Hail's Complaints

Hail individually raised four complaints at issue here: 1) the in person meetings with more than 10 people in attendance, 2) the stolen list of electricians at the Raiders Stadium who tested positive, 3) distributing care packages to retirees while complying with the social distancing guidelines, and 4) raising concerns about the neurological effects of covid.

First, Hail complained about SWRCC holding in-person meetings with more than 10 people in attendance. (ALJD 6:32-34). Prior to COVID the representatives had gathered in a small conference room for their daily debrief meetings. When the pandemic hit, representatives met in a large room, with tables in a horseshoe lay-out and with chairs arranged to maintain social distancing. (ALJD 5: 6-9; SWRCC Exhibit 2).

[4] The GC excepts to this finding without any evidentiary support. Thus, the Council finds this a material fact required to accurately frame the facts of the case.

Governor Sisolak issued Directive 007. (SWRCC Exhibit 68). This directive limited in person gatherings to ten or less. (SWRCC Exhibit 68 – Directive 007, Section 1). The directive stated, in relevant part:

> This provision ***shall not be construed to apply to*** the gathering of persons living within the same household, or ***persons working at or patronizing Essential Licensed Businesses or providing essential services to the public***.

(SWRCC Exhibit 68, Declaration of Emergency Directive 007, Section 1 (emphasis added)). Hail testified that they were dismissive regarding his expressed concerns, telling Hail that the Union was exempt from the limitations on the size of gatherings. (ALJD 6:34-36). The ALJ did not find that Hail complained about the social distancing during these meetings. (ALJD 9:34-10:6).

Second, Hail testified that, on May 18th, he showed Mike Hawk and Steve Dudley a document about the electricians positive COVID test results that he obtained electronically from a carpenter at the Stadium. According to Hail, Mike Hawk made a hand motion indicating that he disapproved of Hail disseminating the document. Mike Hawk testified that he asked Hail what Respondent had to gain from copying and disseminating the document and that the information was already public, Tr. 584. Hawk also testified that he questioned the reliability of the document because Hail had taken the document off someone's desk. (ALJD 6:22-29).

Third, at least some council business agents were ordered to distribute care packages to retired members of the Union. They were told to call the retiree in advance and to take photographs of the retiree receiving a care package. Hail testified that he asked Dudley how representatives were supposed to maintain 6 feet social distancing when handing the care package to the retiree. The ALJ did not credit Hail's testimony that Dudley responded, "Don't ask stupid fucking questions, just do it." (ALJD 7:20-21). Dudley testified as follows:

> Q. Kyle says he raised the concern with you about taking pictures of the reps handing the boxes to the retiree because you couldn't safely distance for that brief interchange. And you
> told him, don't ask stupid fucking questions. Do you –do you –do you remember anything
> like that?
> A. Honestly, from those meetings? I wouldn't necessarily say that Kyle himself brought it
> up. It was brought up several times from every rep, every concern, from every angle. So it was brought up multiple times on face-to-face meeting people. For the most part, the reps set packages down and knocked on the door, took photos that way.

Q. Did you tell the reps, don't ask stupid fucking questions.
A. No, sir, not at all.
Q. Did some reps, take pictures of them giving the—the box over?
A. Without a doubt.

(Tr. 655-56). Hail and *maybe others* raised concerns about handing the care packages to the retiree. At some point, the business representatives started leaving the packages at the front door and photographed the retirees at a distance. Tr. 237. After Hail submitted pictures of retirees taken at a distance, Dudley did not chastise him for not handing the care packages over at the door, Tr. 246. (ALJD 6:41-7:16).

Fourth, Hail also testified that when he mentioned possible neurological effects from COVID-19 at a debriefing session, Frank Hawk told him he was wrong and that he did not know what he was talking about. (ALJD 7:25-27).

D. Plascencia's May 2020 Complaints re: COVID Tests

The only protected activity that Salvador Placentia engaged in was asking Mike Hawk if Respondent planned to test its employees for COVID-19 and arguably getting tested himself. (ALJD 9:10-12).

The Council adjusted its health care to provide covid tests to its members with zero out-of-pocket cost. (Tr. 416:18-19). The Council also instituted a policy to pay $500 upon receipt of a members' positive test. (Tr. 418:2-3). On top of the $500, the members would receive their two weeks of pay for their time in quarantine. (Tr. 418:23-25). The Council office had, in fact, shut down a couple times in response to positive cases. (ALJD 9: 11-13; Tr. 417:3-418:7). Each employee was only allowed to return after receiving a negative covid test result. (Tr. 417:9-10). The staff did not lose their jobs. They did not lose a single paycheck. (Tr. 417:21-418:4).

Early in the week of May 5-8, Hail and Plascencia learned that a State of Nevada agency was going to test workers at the Raiders' stadium for COVID. Plascencia testified that at a debriefing he asked if the Council would test the business representatives for COVID. (ALJD 5:17-19). According to Plascencia, Mike Hawk responded, "if you feel you have symptoms, you can go test yourself to any clinic you want. That's *why we have insurance*." (Sal Tr. 59:6-9)(emphasis added). Plascencia testified that he responded by stating that a person could be infected without having symptoms. (ALJD 5:16-23). Mike Hawk further responded that the Council did not have a plan to test the reps. (ALJD 5:20-21; Tr. 59:22-23).

On Friday, May 8, 2020, on the way to a job assignment in nearby Henderson, Nevada, Hail and Plascencia stopped at the Stadium and were tested. (ALJD 5:25-26). Kyle Hail texted representative Douglas Lockhart, informing Lockhart that he and Salvador Plascencia had received COVID tests at the Raiders stadium. Lockhart went to the stadium and got tested that day. (ALJD 5:43-45). Later that day, during the debrief, Plascencia told Steve Dudley that he and Hail had been tested for COVID that morning. While others testified that the leadership team asked why them got tested, Plascencia testified that nobody asked him why he got tested, Tr. 761. Hail testified that he did not believe Frank Hawk asked why he had been tested and that no other management person did so, Tr. 799. Thus, either Respondent did not express any reaction to either Plascencia or Hail obtaining a COVID test, or merely asked why they did so. (ALJD 6:1-7).

According to Plascencia, another representative, Alex Gonzalez, asked Dudley what the rest of the representatives would do if Plascencia and Hail tested positive. According to Plascencia, Dudley responded:

> I don't know what the fuck we're going to do with this shit, I don't know if we're going to have to fucking close the fucking building or what the fuck. Let me figure out this shit.

(Tr. 66.) (ALJD 5:25-41).

On Wednesday, May 13, Lockhart texted other representatives and Council management that he had received negative test results. Several hours later, Kyle Hail texted that he also received a phone call informing him that his test was negative for COVID. Plascencia responded: "The 3 amigos !!." Steven Dudley responded: "Hazzah!" Mike Hawk posted a picture of a pregnancy test a few minutes later. Lockhart texted: Lol, Kyle is pregnant?!?!?!. Hail responded with reports of a significant number of positive tests among electricians at the Raiders' Stadium. "Like Doug said, it must be more sexually transmitted than previously thought. That's why the sparkies [electricians] are so badly affected." (ALJD 6:9-20). Plascencia responded with a thumbs up emoji. Jovan Johnson laughed at Kyle's text (SWRCC Exhibit 57, Bates 000185-186):

Wednesday , May 13, 2020

Douglas Lockhart (+1 (702) 539-0726)

I just got my test results , negative!!! 10:04:30 AM

+1 (702) 701-6147

10:05:07 AM Just got off the phone with them too . Same.

Sal Plascencia (+1 (702) 333-5654)

The 3 amigos!! 10:06:29 AM

Steven Dudley (+1 (702) 701-6186)

Hazzah! 10:09:49 AM

Mike Hawk (+1 (928) 237-7732)

10:12:14 AM

Jovan Johnson, Sal Plascencia , Steven Dudley, Mike\attachment 57.gif

Douglas Lockhart (+1 (702) 539-0726)

Lol 10:14:45 AM

Kyle is pregnant ?!?!?! 10:15:07 AM

+1 (702) 701-6147

10:15:34 AM Like Doug said , it must be more sexually transmitted than previously thought. That's why the sparkies are so badly affected .

Sal Plascencia (+1 (702) 333-5654)

👍 10:16:23 AM

Jovan Johnson (+1 (702) 371-0087)

Laughed at "Like Doug said , it must be more sexually transmitted than previously thought. That's why the sparkies are so badly affected ." 10:16:42 AM

E. Layoffs

On June 1, 2020, the Council laid off 20 or 21 employees. 16 of the 21 employees laid off worked in one of the California offices of the Council. (ALJD 4:12-13). The 5 laid off within the [Frank Hawk's] jurisdiction were the Charging Parties. (ALJD 4:13-4). Gustavo Maldonado, who worked in Denver, was transferred to the Denver Quad C, a separate employer from the Council,[5] (ALJD 4, fn. 4). Orlando Guzman worked in Reno. Juan Torres worked in Albuquerque. (ALJD 4:15). Kevin Flickinger was a Millwright, (Frank Tr. 486:19-25), and worked in the Colorado region of the Council. (Frank Tr. 487:195-7). He was initially considered for layoff, but Frank Hawk later decided to keep him after he got hit with a debilitating illness and went into a very long coma. (Tr. 487:9-13).

III. The GC's Exceptions Are without Merit

To establish an 8(a)(1) violation based on an adverse employment action where the motive for the action is disputed, the GC has the initial burden of establishing a prima facie case by a preponderance of evidence. *Wright Line,* 251 NLRB 1083 (1980). The GC satisfies that burden by establishing the following: 1) proving the existence of protected activity, 2) the employer's knowledge of the activity, 3) animus against the activity, 4) that is sufficient to create an inference that the employee's protected activity was a motivating factor in his or her discharge. To show that animus motivated the adverse action, the evidence of animus must be sufficient to establish a causal relationship between the protected activity and the employer's adverse action against the employee. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, at 8. A general bias or a general hostility and interference does not supply the element of purpose. It must be established with respect to each discharge." *NLRB v. Dan River Mills, Inc.*, 274 F.2d 381, 384 (5th Cir. 1960), quoted in *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 744 (5th Cir. 1979); *Air Line Pilots Ass'n, Int'l v. E. Air Lines, Inc.*, 863 F.2d 891, 912 (D.C. Cir. 1988). If the GC meets his burden, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The GC argues that the ALJ failed to review "*all the circumstances"* in finding that animus did not motivate the Charging Parties' layoffs. In making this argument, the GC, himself, ignores *all the circumstances.* Instead, he provides a bullet point list of the incidents he believed establishes

[5] *See Trade West Construction, Inc.*, 339 NLRB 12, 13 (May 2003).

animus. For the reasons below, the full circumstances of these incidents support the ALJ's conclusion that animus did not motivate the layoffs.

A. The GC Failed to Establish Animus Towards Plascencia's Protected Activities

As a general matter, the ALJ found that "the *only* protected concerted activity that Salvador Plascencia engaged in was asking Mike Hawk if Respondent planned to test its employees for COVID-19 and *arguably* getting tested himself." (ALJD, 9:10-13)(emphasis added).The GC did not except to this finding.

1. <u>The Timing Does Not Favor a Finding that Animus Motivated the Layoff</u>

Plascencia's protected activities occurred on or after May 7, 2020. (GC Brief in support of Exceptions ("GC Brief"), p. 7 ["By May 7, 2020, the date Plascencia *first* asked his supervisors…"]). This was well after April 2020, the date Frank decided to layoff Plascencia and Hail. (ALJD, 10:22-24 ["I note that there is no evidence contradicting Frank Hawk's testimony that he decided to lay-off Hail and Plascencia in April…"]). While the GC excepts to this finding, his only supporting argument is that "Respondent produced *no other witnesses to corroborate* any of this testimony." (GC Brief p.9). Simply contradicting the ALJ's conclusion without excepting to the underlying findings does not carry his burden of establishing animus by a "preponderance of evidence." (29 CFR §102.46(f) [Matters not included in exceptions may not thereafter be urged before the Board, or in any further proceeding]). Without contradicting evidence, the ALJ properly determined that the decision was made in April 2020. The ALJ's determination that Plascencia's alleged protected activity only occurred *after* the decision to lay off Plascencia was made is supported by the record. Accordingly, the timing goes against a finding of animus towards Plascencia's alleged protected activity.

2. <u>The Full Circumstances Show No Animus Towards Plascencia Request for COVID Tests</u>

While animus may be inferred from the totality of circumstances, the circumstances surrounding Plascencia's protected conduct does not imply animus. The Council only responded to his protected activity with a response based on the cold, hard facts or had no real reaction at all. Ironically, while arguing for consideration of the full circumstances, the GC disingenuously describes only part of the incidents surrounding Plascencia's alleged protected activities. Going through each of the bulleted incident related to Plascencia, the Council will show how the full

circumstance does support the ALJ's conclusion that "the record does not establish Respondent's animus towards [Sal]…" (ALJD 10:38-39).

"Early in the week of May 5-8, Sal learned that a State of Nevada agency was going to test workers at the Raiders' stadium for COVID." (ALJD 5:17-18). Afterwards, Plascencia asked at a debrief meeting if the Council would test the representatives for COVID. (ALJD 5:18-19). Mike Hawk responded, "if you feel you have symptoms, you can go test yourself to any clinic you want. That's *why we have insurance*." (Sal Tr. 59:6-9)(emphasis added). Mike Hawk further responded that the Council did not have a plan to test the reps. (GC Brief, p.6; Tr. 59:22-23).

The GC deliberately ignores the full circumstances of the incident. Instead, he only mentions that Mike Hawk told Plascencia that he could be tested at a medical clinic, (GC p. 5), and intentionally leaves out the health insurance reference. This is because it would contradict his claim that the Council did not "constructively" address its employees' concern. The unrefuted record establishes that the Council had adjusted its health care plan to provide covid tests to its members with zero out-of-pocket cost. (Tr. 416:18-19). This is unambiguous evidence that the Council took *proactive* steps to provide tests even *before* Plascencia's request. In fact, the ALJ correctly found (and the GC did not except to the finding) that the "record shows, for starters, that Respondent was far from indifferent regarding the exposure of its employees to COVID. It took many precautions to minimize the risk to these employees and union members generally." (ALJD, p. 9:6-9). Still, it was generally known that during the beginning of the pandemic covid testing kits were in short supply, (SWRCC Exhibits 28-30), and was limited to those sick or showing symptoms. (SWRCC Exhibit 29 ["Both facilities are testing only people with symptoms…"]).

Within this full context, Mike Hawk constructively reiterated the unavoidable facts – the employees could get tested if they are showing symptoms. Beyond that, the Council had no more power to test its employees than the next employer. Truthfully responding that the Council had no plan to provide testing for its employees was the only response within its power. Mike Hawk could not have engaged more honestly without making empty promises.

3. <u>The GC Fails to Establish Animus Towards Plascencia Taking a Test and Its Response to Gonzalez's Question</u>

Plascencia and Hail got tested on May 8th. (ALJD 5:25-26). Hail had texted Lockhart that there were Covid tests available at the Raiders Stadium. In response, Lockhart also went to the stadium and got tested that day. (ALJD 5:43-45). After they got tested, the Charging Parties told

Dudley that they had gotten tested during a debrief meeting. (ALJD 5:32-33). The Charging Parties testified that the leadership team did not question them on why they got tested. (ALJD 6:4-6). After the Charging Parties notified the team that they got tested, another business representative, Alex Gonzalez, asked what the Council would do if the Charging Parties tested positive. In response, Dudley responded:

> I don't know what the fuck we're going to do with this shit, I don't know if we're going to have fucking close the fucking building or what the fuck. Let me figure out this shit.

(ALJD 5:33-39; Tr. 66). The GC argues that this response is evidence of animus, but insincerely quotes the statement in attempts to shape it into a threat. Such a narrow analysis ignores three important issues:

First, the ALJ determined that getting tested was arguably a protected activity. However, the GC did not except to the ALJ's finding that, "either Respondent did not express any reaction to either Plascencia or Hail obtaining a COVID test, or merely asked why they did so." (ALJD, pg. 6:6-7; Tr. 761, 799). The GC's failed to explain how a lack of response is evidence of animus. Additionally, he failed to address the disparate treatment between the Charging Parties and Lockhart.

Second, any claim that the response to the potential positive result is evidence of animus is without support that a positive test result is a protected activity. In other words, the GC cannot establish that this incident was evidence of animus against a protected activity. *Healthy Minds, Inc.*, 2021 NLRB LEXIS 283, *57 (The GC meets his burden by showing that the employer "harbored animus against [the protected] activity.").

Even presuming that a positive test result is a protected activity, Dudley's response was not an unlawful statement under the threat versus prediction analysis. A lawful prediction is an objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), and there is a direct and necessary correlation between the protected activity and the predicted outcome. *Chinese Daily News*, 346 NLRB 906, 907 (2006).

For example, in *Rospatch Corp.*, the ALJ found that President Brush had asserted that fighting the union or negotiating with the union would cost a lot of money and would come out of the profits that could have gone into the employees' profit-sharing plan. *Rospatch Corp.*, 193

NLRB 772, 773-74 (1971). In *Rospatch Corp.*, the Respondent established a *direct and necessary correlation* between the corporation's reduction of profits and the employer's contributions to its profit-sharing plan. *Chinese Daily News*, 346 NLRB 906, 907 (2006). Accordingly, the Board found that this statement was a lawful prediction of possible economic consequence, and not a threat of reprisal. *Rospatch Corp.*, 193 NLRB 772, 772 (1971).

In comparison, in *Chinese Daily News*, the Board found that the statement at issue was not an objective economic prediction. *Chinese Daily News*, 193 NLRB at 907. In that case, reporter Lynne Wang was taking notes during a meeting with the company management personnel. Chen, the Chief Editor Shih-Yaw Chen, berated her for taking notes:

> You are taking notes and will give to the union staff and sue the company. Every little thing you will sue the company. He said, that the company had to hire a lawyer to defend and increase the expense of the company, decrease the profits of the company, will have negative impact on the employees' benefits, including the yearly end bonus.

Chinese Daily, 346 NLRB 906, 907 (2006). Chen was not responding to questions during normal workplace conversations. Instead, he spontaneously raised Wang's note taking and assumed it would lead a union lawsuit and connected it to decrease in employees' benefits. *Id.* The employer did not offer objective evidence to establish any necessary correlation between costs incurred by the Respondent in connection with the union campaign and the continuation of existing yearend bonuses or other employee benefits. *Id.* Accordingly, the Board in that case found that the statement was an unlawful threat and now a lawful prediction. *Id.*

Here, Dudley's statement, like Brush's, was not an unlawful threat but a lawful prediction of the potential consequences of a positive test result amongst the Council employees. At the time he did not know what the Council would do in that circumstance considering it was the first pandemic within the past 100 years.

Unlike Chinese Daily News, however, the Council has provided evidence of a direct correlation between the potential positive test result and the prediction that the Council may have to shut down the office. The unrefuted evidence establishes that the office had, in fact, shut down a couple times in response to positive cases. (Tr. 417:3-20; ALJD 8:11-13 ["Union hall closed and was disinfected, and staff had to self-quarantine."]). Each employee was only allowed to return after receiving two negative covid test results. (Tr. 417:9-10). The staff did not lose their jobs. They did not even lose a single paycheck. (Tr. 417:21-418:15). These shutdowns were necessary

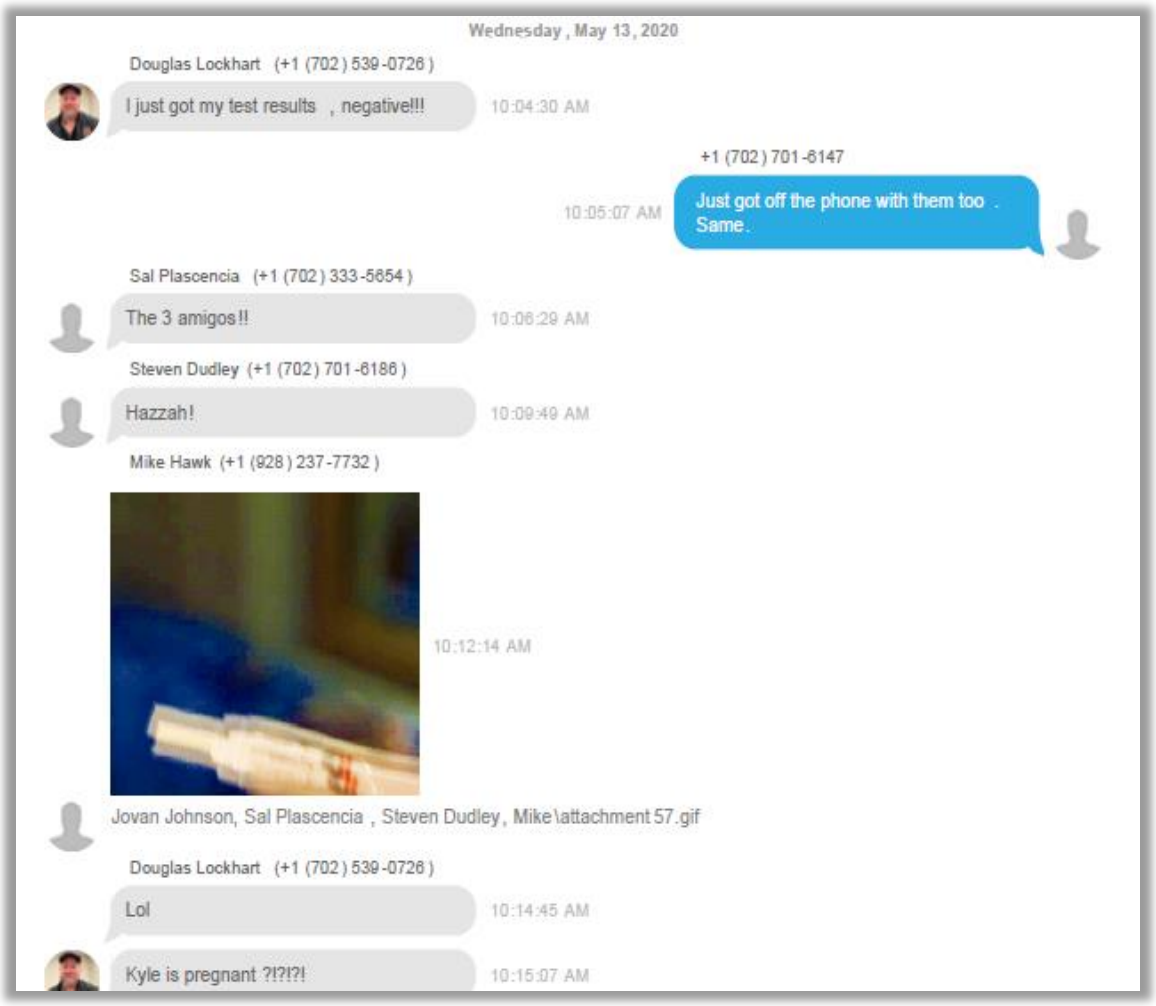
to be in compliance with government recommendations and in light of the well-known fact that covid is airborne and extremely infectious. In fact, keeping the office and expecting the employees to continue working would have been more coercive and dangerous. Also, unlike Chen's statement, Dudley's statement was in response to Alex Gonzalez's question during a normally held debrief. It was not spontaneously raised in response to a positive test result.

Additionally, in light of the Council's contemporaneous behavior, the Board should find that no unlawful meaning should be attached to the statement. *Wagner Industrial Products Company Inc.*, 170 NLRB 1413, 1413 (1968)("An examination of Respondent's contemporaneous behavior in the instant case persuades us that no unlawful meaning should be attached to the words in issue."). The day before Dudley's statement, "Mike Hawk had already encouraged the representatives to get tested if they thought it was warranted. The consequences of a positive test for any of the Respondent's employees would have the same consequences." (ALJD 9:21-23). The next day, when the Charging Parties notified the Council that they had gotten tested, "either Respondent did not express any reaction to either Plascencia or Hail obtaining a COVID test, or merely asked why they did so." (ALJD, pg. 6:6-7; Tr. 761, 799). Together, the two findings, to which the GC did not except, show that there was no animus to a positive test result. Dudley's statement merely predicted a possible consequence to a positive test result. It was not a threat of reprisal. *See Wagner Industrial Products Company Inc.*, 170 NLRB 1413, 1413 (1968).

4. Response to Negative Test Result Is Not Evidence of Animus

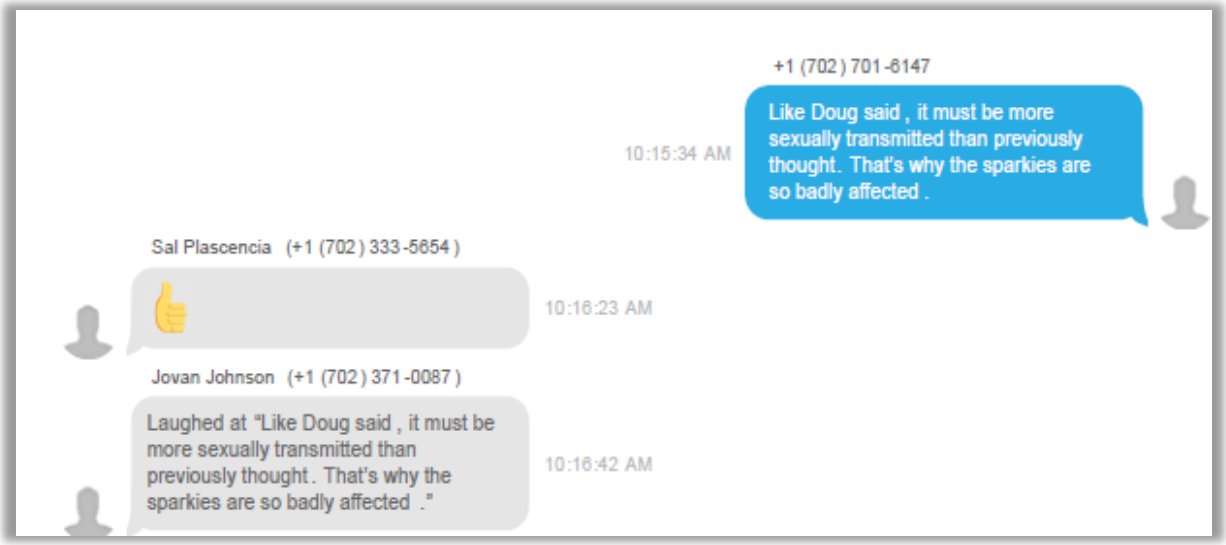
A statement violates Section 8(a)(1) if it "can reasonably be interpreted by an employee as a threat." *Consol. Bus Transit, Inc.,* 350 N.L.R.B. 1064, 1066 (2007) quoting *Smithers Tire*, 308 NLRB 72, 72 (1992). Conversely, if the statement contains no threat of reprisal or force or promise of benefit, it shall *not constitute or be evidence* of an unfair labor practice. (Section 8(c))(emphasis added); *United Site Services of California, Inc.*, 2020 NLRB LEXIS 395, fn 68 (2020) ("We agree with these courts that Sec. 8(c) precludes reliance on statements of opinion that neither threaten nor promise as evidence in support of any unfair labor practice finding. To the extent Board precedent is to the contrary, it is hereby overruled.").

Here, because the shown group text messages contain no threat of reprisal or force or promise of benefit, it cannot be evidence of an unfair labor practice.[6]



[…]

[6]At the hearing, the GC had argued that the Council had somehow deleted certain text messages. In response, the Council attached copies of the text messages from two separate phones to show that the text messages were never deleted. (See Exhibits attached to the Council's Post-Hearing Brief). These documents were never struck from the record. The GC did not except to the ALJ's lack of decision on this issue. 29 C.F.R. § 102.46(g) (No matter not included in exceptions may thereafter be urged before the Board, or in any further proceeding). Having shown no extraordinary circumstances for this failure, the GC has waived this objection. (29 U.S.C. § 160(e); *Elmhurst Care Ctr. v. NLRB*, 303 Fed. Appx. 895, 897 (2008)). Accordingly, any issue related to the gif is based on the shown text messages.



(SWRCC Exhibit 57, Bates 000185-186).

Contrary to the GC's contention, even without looking at the Council's intent, these text messages, on its face, clearly illustrate a celebratory response. Mr. Dudley exclaimed "hazzah!" which was interpreted as an "exclamation of joy." (Lockhart Tr. 547:19-23). Mike Hawk joked with a positive pregnancy test gift. Mr. Lockhart joked that Mr. Hail was pregnant and Jovan Johnson laughed. Even Mr. Plascencia, himself, responded with a thumbs up emoji. What is evidence of animus is left unexplained. Instead, the GC only concludes that Mike's response "ridiculed Plascencia." (GC, p.8).

Additionally, the record establishes that the other representatives believed the gif to be a joke. The other representatives who were present in the group chat are arguably the best test of the reasonable person. The other representatives believed the context of the gif was a joke, (E.g., Doug Tr. 547:24-548:6; Brandon Tr. 633:22-634:9), including Hail. (Kyle Tr. 245:20-25). In fact, the record contains no evidence that even Plascencia believed this to be a threat. The record only shows, at best, his confusion as to the gif's meaning. (Sal Tr. 69:12-16 ["…why—why do you think he posted this pregnant – pregnancy test?]). The GC does not argue otherwise. (GC Brief, p. 7 ["Confused, Plascencia asked Hail why Michael Hawk would respond that way."]). Seemingly, the gif was so innocuous that Plascencia did not even know what it meant. The reasonable person did not interpret the statement as a threat, and animus cannot be inferred based on the GC's own interpretation of an image.

Finally, it remains part of the unrefuted record that the other business representatives were not chilled by the Dudley's alleged response. Instead, the record shows that Kyle allegedly asked

Dudley about how to deliver the care packages to the retirees. Moreover, the ALJ also concluded that "maybe others raised concerns about handing the care packages to the retirees…" (ALJD, p.7:18-19). Clearly, the reasonable person did not find the gif to be a threat or was chilled by it.

B. The GC Fails to Establish Animus Towards Hail's Protected Activities

1. The GC Does Not Dispute That Hail Feared Losing His Job Before the Pandemic

In December 2019, Frank Hawk had met with Hail individually. According to Frank Hawk, he told Hail that if he had to lay somebody off, it would be Hail. Frank Hawk criticized many aspects of Hail's job performance, stated that the location of his tattoos made it difficult for him to send to certain types of job assignments, and that he was still angry about Hail's use of the Council-related Facebook page in a dispute with a Girl Scout troop leader. (ALJD 3:38-4:4). After this meeting, Hail printed out his 2018 performance review because "Hail believed he was in danger of being terminated." (ALJD, p. 3:25-27).

The ALJ correctly determined, and the GC did not except, that "Frank Hawk was very upset with Kyle Hail long before he engaged in any activity protected by the NLRA." (ALJD 4:8-10; see also ALJ Tr. 836:11-18 ["…it seems to what's relevant is that he was taking steps, defensive steps, you know, months before the pandemic began."]).). While the GC excepts to the additional finding that "[w]ith regard to Kyle Hail, it is clear that his job was in danger months before he engaged in protected activity related to COVID," (GC Exception #6), the GC does not provide the grounds for this exception. (*See* 29 C.F.R. Section 102.46(a)(1)(d)). In fact, Kyle's own testimony directly contradicts this exception:

> Q And in December of 2019, you were afraid for your job?
> A I felt that I had been threatened, yes.

(Tr. 832:2-3).

2. Timing of the Protected Activities Shows That Animus Did Not Motivate The Layoff

As mentioned above, the unrefuted record establishes that Frank Hawk's decision to lay off the Charging Parties occurred early April 2020. The GC's failure to establish that Hail's protected activities occurred before April 2020 is fatal to establishing that animus motivated Frank Hawk's decision.[7] While the GC claims that Hail complained about the indoor capacity rules not

[7] The GC's claim that "the ALJ correctly concluded that, beginning in March 2020, Charging Parties Hail and Plascencia repeatedly engaged in protected, concerted activities…" misconstrues the ALJ's decision. (GC Brief, p. 8). The cited portion of the decision does not support the statement that the Charging Parties began engaging in protected activities in March 2020.

being followed during the in-person debriefs before April 2020, no evidence supports this claim. The cited transcript pages do not support this claim. (GC Brief p.3-4). The GC's implied claim that "[s]ometime prior to the beginning of May 2020," Hail discussed the neurological effects with Frank Hawk is also unsupported by the cited transcript pages. The remaining bulleted complaints by Hail and Plascencia, (GC Brief p. 4-5), occurred in May 2020. As such, claiming that the alleged protected activities motivated a decision that was made prior its occurrence is temporally illogical. For this reason alone, the GC cannot establish by a preponderance of evidence that layoff decision was motivated by animus.

3. Failed to Establish Animus Towards Activities

Even generously presuming the activities occurred before the decision was made, the GC still failed to establish that animus towards the protected activities motivated the layoff decision. The evidence refutes each of Hail's individual bulleted points below.[8]

a. Complaint about the 10-Person Capacity Limit

First, Hail allegedly complained about the capacity rules for their debrief meetings.[9] For context, the government declaration stated, in relevant part:

> This provision ***shall not be construed to apply to*** the gathering of persons living within the same household, or ***persons working at or patronizing Essential Licensed Businesses or providing essential services to the public***.

(SWRCC Exhibit 68, Declaration of Emergency Directive 007, Section 1 (emphasis added)). In response, Mike Hawk's responded that the in-person meetings did not violate the government directive because it did not apply to essential businesses such as the Council. His response was merely correcting Hail's misunderstanding Accordingly, Mike Hawk's alleged response cannot be construed as baseless or unreasonable. *J. S. Troup Electric*, 344 NLRB 1009, 1015 (2005) (noting that the Board will infer an unlawful motive or animus where the employer's action is "'baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive.'") (citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995). Simply correcting an employee's misunderstanding cannot raise a presumption of animus. The Council's statement was a lawful opinion as to whether the

[8] The GC failed to establish animus with respect to Hail getting tested for the same reasons provided in Section III.A.2.

[9] The GC does not except to the ALJ's lack of finding regarding the social distancing complaint. Thus, the argument that this was a protected conduct is waived.

directive applied to the Union. *Agri-International Inc.*, 271 NLRB 925, 926 ("the Respondent was under no obligation to shield its employees from the 'cold, hard facts'..."). Beyond claiming the response was "dismissive," the GC fails to further elaborate how correcting an employee's misunderstanding can amount to evidence of animus. (GC Brief, p.4).

b. Neurological effect

Second, Hail claimed to have brought up his concerns about the neurological effects of covid during the debrief meetings. Hail testified that Frank Hawk told him that he was wrong, he didn't know what he was talking about, and don't say that. (GC Brief, p.4). The context of Frank Hawk's response, however, does not support imputing animus to his statement. First, Hail was already out of favor with Frank Hawk in light of his underperformance and misuse of the Council's social media to engage in a personal vendetta attack on the Girl Scouts, which is further discussed below in Section III.D.2.c. In addition, during the beginning of the pandemic, the nation was in a panic. The government and the experts were giving conflicting messages and misinformation was prevalent. In this atmosphere, Frank Hawk did not want to fuel the confusion and panic with unsubstantiated claims. Like the gif, Frank Hawk's statement contains no threat of reprisal and is protected under Section 8(c) and, thus, cannot be evidence of animus.

c. Care Packages

Third, the discredited response by Dudley to Hail's question about how they could deliver care packages to the retirees and abide by the social distancing guidelines does not support a finding of animus. In making this claim, the GC, once again, ignores the full circumstances. The ALJ made the following finding:

> I do not find Hail more credible than Dudley as to whether he told Hail not to ask stupid questions. Moreover, after Hail submitted pictures of retirees taken at a distance, Dudley did not chastise him for not handing the care packages over at the door.

(ALJD 7:20-23). The GC did not except to this finding. Because the ALJ did not credit Hail's allegation that Dudley responded in such a way, there is no evidence of animus towards this complaint. Moreover, the GC did not except to the finding that Dudley never chastised Kyle for ignoring the instructions and not handing over the care packages. (ALJD 7:20-23; Tr. 246). The GC does not direct the Board to any evidence that would support a finding of animus.

d. Electricians List

Finally, the Council's response to Hail sharing a document showing the number of electricians who tested positive cannot be used as evidence of animus. Hail testified that he brought up a list of electricians who tested positive during a debrief meeting and Mike Hawk responded by pushing his hands down as if to say, "keep it quiet." (GC Brief p.5). The GC claims that this hand gesture was evidence of animus.

This claim fails to consider the full circumstances. Mike Hawk had testified that Hail told him that he took the paper off somebody's desk and he wanted to copy it and spread it at the job site. Hail wanted to notify everybody that the electricians were the ones with the most positive cases. Mike Hawk believed that the document was stolen and did not know how valid the information was. (ALJD 6:26-29). Moreover, it was common knowledge at the job site that the electricians were the ones with the most positive cases at the Raiders Stadium. (Mike Hawk Tr. 584 ["And I told him, I said well, that's – you know, that's no secret. It was in the newspaper that they're having issues out there, and that's what brought the Health Department down there."]; SWRCC Exhibit 32 ["We have identified new cases over the past few weeks mostly localized in the team of electricians working on site."]). In this context, this gesture does not even remotely constitute a "threat of reprisal or force or promise of benefit." Accordingly, under 29 U.S.C. § 158(c), it cannot be used as evidence of an unfair labor practice. *Sasol N. Am., Inc. v. NLRB*, 275 F.3d 1106, 1112 (D.C. Cir. 2002)(finding that the statements cannot be used as evidence of animus because it contained no threat of reprisal or force or promise of benefit).

In light of the foregoing, not a single incident establishes even an inference of animus towards Hail's protected activities. Additionally, the full circumstances show that, even together, the Council's responses to the protected activities do not amount to animus by a preponderance of evidence.

C. The GC Failed to Establish that Animus Motivated the Adverse Employment Decision

In *Tschiggfrie Properties*, the Board clarified that the GC *does not invariably* sustain his burden by producing *any* evidence of the employer's animus or hostility toward union or other protected activity, but instead must produce evidence "sufficient to establish that a *causal relationship* exists between the employee's protected activity and the employer's adverse action against the employee." *Healthy Minds, Inc.*, 2021 NLRB LEXIS 283, at *21 (July 15, 2021)(emphasis added). To support an inference of unlawful motivation, the Board looks to such

factors as disparate treatment of certain employees compared to other employees with similar work records or offenses, inconsistencies between the proffered reason for the adverse employment action, deviation from past practice, and timing. *West Maui Resort Partner*, 340 NLRB 846, 848 (2003).

1. The Lack Of Disparate Treatment Goes Against A Finding that Animus Motivated the Layoff Decision

The GC contends that the Council's decision to "save" Flickinger and Maldonado is evidence is evidence of disparate treatment and, thus, evidence that the Charging Parties were let go because of anti-union animus. This would only make sense if Flickinger and Maldonado were actually "similarly situated" with the Charging Parties. They were not.

In analogizing the employees, the GC conveniently ignores the facts that starkly differentiate these employees. First, the GC ignores the fact that the layoff decision depended on the employee's state's financial outlook. In other words, an upward financial trend in Colorado did not affect the employment decisions made in Las Vegas. Conversely, a plummeting Las Vegas economy will not affect the employment decisions made in Colorado.

Arguing that employees in Colorado are similarly situated to the Charging Parties who were employed in Las Vegas is illogical, especially in light of the financial reports for each state. The Supplemental Dues Fiscal Year Report provides a specific financial outlook of Las Vegas Local 1977. (GC Exhibit 6). It illustrates the loss of jobs and the overall downward trend of hours worked. In March 2020, Local 1977 reported 638,056.77 hours worked. These hours encompass both pre- and post- shutdown hours as the shutdown order became effective late March. (SWRCC Exhibit 13). In April, Local 1977 reported 491,509.73 hours worked. In May, 519,313.69 hours were worked. By June, the hours worked was down to 474,559.22. Local 1977 did not see the pre-pandemic high 600-700k hours after the pandemic began. Frank Hawk testified that, at the time of the hearing, the Las Vegas work hours was down by 40%. (Tr. 464:16-20). This downward trend in hours worked and its corresponding income provides the correct context to the Charging Parties' layoffs.

Colorado's financial report, on the other hand, does not provide the correct context to view the Charging Parties' layoffs. But it does provide the correct context to view the decisions made with respect to the Colorado employees, Flickinger and Maldonado. The Colorado's financial report shows that after a tremendous drop in hours in April the hours quickly bounced back and

stabilized. (GC Exhibit 6). This shows why employees such as Maldonado and Flickinger were initially considered for layoff, and why Flickinger was subsequently "saved."

Second, Maldonado's new employment with the Carpenters Contractors Cooperation Committee, or the Quad C, is not evidence of disparate treatment. The Quad C is an organization that is funded by construction contractors that employ union carpenters. The purpose of Quad C is to monitor nonunion contractors and insure that they pay prevailing wages. *Trade West Construction, Inc.*, 339 NLRB 12, 13 (May 2003). As a separate entity from the Council, the Council has no authority to hire or fire employees for the Quad C. In 2020, Quad C was "starting a new operation [in Colorado], and they felt that [Maldonado] would make a good fit for their operation…" (Frank Tr. 475:16-18). The GC does not provide evidence or establish that the Quad C, similarly, had an open position in Las Vegas. He does not establish that there was another position open in Las Vegas for the Charging Parties. Without such options, it is impossible to see how Frank Hawk should have "veered" from his initial decision to lay off the Charging Parties.

Third, the Charging Parties and Flickinger were not similarly situated and beyond comparison. The unrebutted record shows that Flickinger, a Millwright in Colorado, who got hit with a debilitating illness and went into a very long coma. (Tr. 487:9-13). Essentially, the GC argues that to have avoided the unlawful labor practice charge, the Council should have also let go of a hospitalized employee who, then, must wake up to unemployment and no knowledge as to why. Such a nonsensical argument will only lead to morally reprehensible outcomes.

The Council's response to the true similarly situated employees who worked from the Las Vegas office and engaged in similar protected activities shows that animus did not motivate the layoffs. As provided above, the Charging Parties were not the only ones who got tested at the Raiders Stadium. Lockhart also got the covid test. (Tr. 542:25-543:2). Lockhart was not let go. The leadership team knew that all three had gotten tested before the layoffs became effective. Thus, if animus towards the protected activity motivated the layoffs, the Lockhart should have also been let go.

Moreover, the GC failed to explain the lack of disparate treatment between those who complained and raised concerns of covid safety, including the Charging Parties, from those who did not. As the record shows, the Charging Parties were not the only ones who raised concerns regarding covid safety. As Hail testified, "there was a general discussion going around the room about COVID and whatnot." (Tr. 189:16-17). This was further supported by the Charging Parties

testimony that Mr. Gonzales asked Mr. Dudley what would happen if the Charging Parties got a positive test result. (Tr. 66:21-67:9). Dudley's also testified that other representatives voiced concerns about delivering care packages: "It was brought up several times from every rep, every concern, from every angle." (Tr. 656:5-10). This was undisputed and credited by the ALJ. (ALJD, p. 7:18-19 ["I conclude that Hail and maybe others raised concerns…"]).

Another unrebutted example of a complaint raised by other business representatives was the anecdote about the argument between Wayne Boehme and Cristobal Corona. Mr. Corona would not wear his mask during the early stages of the pandemic. Mr. Boehme brought this concern to Frank Hawk's attention. (Tr. 309:4-312:20). Wayne Boehme was not let go. (Tr. 311: 21-22).

Mr. Lockhart, Mr. Gonzales, and the other representatives were not let go. Accordingly, the GC's tenuous comparison of employees in different states is a misdirection. Comparing the truly similarly situated Las Vegas employees establishes that the layoffs were not motivated by animus.

2. The GC Failed to Adequately Establish Inconsistency

The GC claims there is evidence of inconsistency between the Council's proffered reason for the layoff and its other actions. He claims that because the Council never made a single notation of their poor performance, this is evidence that poor performance did not motivate their layoffs. (GC Brief, p.12-13). However, application of *West Maui Resort Partner* would lead to a contrary conclusion. In that case, the Board found that animus did motivate the adverse employment actions because the employer departed from its own written policy of progressive discipline. *West Maui Resort Partner,* 340 NLRB 846, 850 (2003). In contrast, here, the GC cannot point to a single document that requires the Council to keep written notes of disciplines. The employee handbook does not contain a procedure on discipline and warnings for poor job performance. (See GC Exhibits 3 & 19). Moreover, the GC provides no additional evidence that the discipline of the other employees in Las Vegas were ever notated in their personnel files.

3. There Is No Departure from Past Practice

The GC cannot establish a departure from past practice. As the ALJ correctly noted "this is the first [pandemic] that's affected the United States in wholesale since 1918 so I know that." (Tr. 210:10-12). The GC provides no evidence of a departure from past pandemic practice to compare the Council's response to. In fact, the only evidence of a comparable event to today's

pandemic was the 2008 great recession and the decisions made during the great recession conforms with the decisions in the instant case:

> Q […]. So you never went back up to the numbers of reps and clerical that you pre the great recession?
> A No, and also the Las Vegas office today is the headquarters for all of our outlying states, for the Regional Council outside of California, too. So today we handle all of the accounting for the outside states, the payroll, the -- the -- the contract administration. So we do a lot more here with less staff.

(Frank Tr. 352:21-353:3). Accordingly, past practice does not favor a finding of animus.

4. The Timing of The Protected Activities and the Layoff Decision Goes Against a Finding that Animus Motivated the Decision

Under *Wright Line*, the GC has the burden to make the initial showing that the protected conduct motivated the employer's decision. *West Maui Resort Partner,* 340 NLRB 846, 848 (2003). The GC implicitly acknowledges that the layoff decision could not have been motivated by the protected activity if the decision was made before the activities. (GC Brief, p. 10 ["ALJ erroneously concluded Frank Hawk made his decision to terminate the Charging Parties prior to *any* of their protected conduct."]). Thus, in order to establish that animus motivated the layoffs, he opposes the ALJ's conclusion that the decision was made prior to the protected activities by claiming:

> Respondent's defense rests entirely on manager Frank Hawk's testimony that he made his decision to terminate the Charging Parties sometime in April 2020 because of their supposed long-term performance issues. While Frank Hawk also testified that he and Respondent's other executive staff discussed Respondent's layoff plans several times in April and May 2020, Respondent produced *no other witnesses to corroborate* any of this testimony.

(GC Brief, p. 9).

This is an improper attempt to shift his burden to the Council. It was the GC's burden to show that the protected activities motivated the decision. Thus, in this case, he had the burden to show that the decision was made after the protected activities. For the same reasons as discussed above in Sections III.A.1 and III.B.2, the timing of the events goes against a finding that animus motivated the layoffs.

D. The Charging Parties Would Have Been Laid Off Regardless of Their Protected Activities

Even if the Board finds that the GC carried his burden to establish a prima facie case (which he did not), the Council established that it would have taken the same action even if the Charging Parties had not engaged in the protected concerted activity. *Wright Line*, 251 NLRB at 1089. From the beginning, the Council's reasons were twofold. First, the economic downturn caused by the pandemic resulted in the need for layoffs. Second, the layoff decision was made based on the Las Vegas business representatives' *comparative* performance and value of the business representatives. (See GC Exhibit 15 ["The two charging parties were chosen because they offered the union the lowest value for the members' dues it uses to pay them."]). For the reasons discussed below, the GC has failed to establish that the Council's purported reasons were pretextual – *i.e.*, the purported reasons were false or not actually relied upon. *Healthy Minds, Inc.*, 371 NLRB No. 6, *22 (2021).

1. <u>The Council's Reasons for the Layoffs Never Shifted and Are Consistent With Its Other Actions</u>

The lack of documentation of the Charging Parties' poor performance is not evidence of pretext. (GC Brief, p. 16). In *Healthy Minds,* the Charging Party, Reese, worked for Healthy Minds and engaged in protected activities. *Healthy Minds, Inc.*, 371 NLRB No. 6, *7-17 (2021). She met with Dr. Nichols, a co-owner of Healthy Minds, regarding Reese's intent to file a racial discrimination claim and the protected concerted activities. *Healthy Minds, Inc.*, 371 NLRB No. 6, *16-17 (2021). Nichols concluded the meeting by discharging Reese for copying and stealing timesheets and badmouthing the company. *Healthy Minds, Inc.*, 371 NLRB No. 6, *58 (2021). Subsequently, the company's purported reason in the to the unemployment claim was Reese's failure to follow company rules. *Healthy Minds, Inc.*, 371 NLRB No. 6, *25 (2021). The Board found that the Respondent's purported reasons for the discharge were pretextual based on the inconsistent and shifting reasons. *Healthy Minds, Inc.*, 371 NLRB No. 6, *25 (2021).

The instant case is distinct from *Healthy Minds* because the Council's provided reasons for the discharge has never shifted and are consistent. For example, in the Council's initial position statement dated August 14, 2020, the Council provided that the reasons for the layoff was due to the economic downturn and a "holistic overview of each employee's job performance, expertise, and education. (GC Exhibit 14 p.4). Almost a year later, Frank Hawk testified that the Charging

Parties were let go because he had to "make cuts of that *bottom tier of low performers* at the time of knowing that we're going to be having this – this hit from COVID." (Tr. 521:2-5)(emphasis added). This was again emphasized in the Council's post-hearing brief dated July 19, 2021. (*See generally* Carpenters Post-Hearing Brief, Section VIII). Accordingly, unlike Healthy Minds, the Council's reasons for the layoffs never shifted; therefore, it is not pretextual.

Contrary to the GC's claim, Hail's evaluation is consistent with the Council's reasons for Hail's layoff and is not evidence of pretext.[10] (See GC Brief, p. 16). Frank Hawk testified that, before Hail was hired, Hail "was one of the best volunteers," (Tr. 353:15-16), and "participated in everything." (Tr. 353:18-25). For this reason, Frank Hawk decided to give Hail a chance. (Tr. 355:12-13 – "I says, look, Kyle's earned his shot to – to get here."). After a year with the Council, Hail received a fair performance evaluation in 2018. (Tr. 150:25-151:3; GC Exhibit 2). Then, Hail's "vigor and enthusiasm" disappeared: "It's like he made it to the mountaintop and he put the car in neutral." (Tr. 361:11-18). After being frustrated with Mr. Hail's declining performance, Frank Hawk decided to speak to Mr. Hail about his job performance in December of 2019. (Tr. 363:13-137:2). The significance of this meeting is undisputed, it "establishes that Frank Hawk was very upset with Kyle Hail long before he engaged in any activity protected by the NLRA." (ALJD, 4: 8-10). The full circumstances of Hail's employment with the Council clearly contradicts GC's claim that the "poor performance became worthy of termination only *after* they engaged in protected conduct…" (GC Brief, 15).

Additionally, the ALJ "not necessarily" crediting the testimony of the Council's witnesses with respect to their seniority rights is not inconsistent with the Council's reasons. The Council never proffered seniority as a reason. It was the GC who claimed that the Charging Parties were let go in violation of their seniority rights. (GC Post-Hearing Brief, p. 18, n. 18 ["Nonetheless, Kyle's and Plascencia's layoffs did not honor their seniority, as several representatives were hired in Las Vegas after them. (Tr. 75,110)."]). However, even in making this argument the GC never established that the Charging Parties had seniority rights. Mr. Plascencia was unable to point to any document that gives business representatives seniority rights. (Tr. 112:13-15). In fact, even the employee handbook does not contain a seniority clause. (GC Exhibit 19). Pretext cannot be

[10] The GC claim that "both parties received favorable evaluations," (GC Brief, 16), is unsupported by evidence. He does not cite to a supporting evaluation or testimony that Plascencia ever received a favorable evaluation.

found when it was never proffered as a reason relied upon. *Healthy Minds, Inc.*, 371 NLRB No. 6, *22 (2021).

2. The Charging Parties Were the Bottom Tier of Performers

Perhaps the GC finds the reasons illustrating the Charging Parties' underperformance a "mish-mosh of trivialities." However, to the Council the culmination of the various incidents resulted in Frank Hawk's determination that the Charging Parties brought in the least value for its members.[11]

a. The Charging Parties Had No Specialty

The Charging Parties failed to excel in many positions, and their experience was unremarkable and redundant. Both the Charging Parties claimed to have experience with bannering, (Tr. 42:14-20; Tr. 141:25-142:6), and with training new representatives. (Tr. 46:1-9; Tr. 148:16-19). This was not a special skill that only they had, however. This was a responsibility that all the representatives were trained in. (Tr. 115:11-16; Tr. 230:13-21).

Unlike the other representatives, the Charging Parties had no hotel service representational skills, (Tr. 374:3-6), no millwright service representation skills, or political skills. (Tr. 388:3-7). Unlike the other representatives, they were never a superintendent, a foreman, (Tr. 390:2-13), or a trustee on any trust funds. (Tr. 395:19-22). Unlike the other representatives, Hail never handled a grievance, a contract issue, or a precinct walk. (Tr. 361:25-362:5). Put simply, while the other business representatives had a specialty, the Charging Parties only performed tasks that the other representatives could do.

b. Plascencia's Comparative Performance

As Frank Hawk testified, Plascencia was underperforming going into the pandemic. Rather than immediately firing Plascencia, Frank Hawk provided Plascencia years of opportunity to find his niche within the Council.

[11] The ALJ took "judicial notice of the fact that the Las Vegas economy is particularly dependent on gambling and you know, the tourism business," (Tr. 321: 2-3), and the Nevada economy tanked more than most other places in the country, and that there were job losses. (Tr. 321:3-6; SWRCC Exhibit 52). The GC does not dispute the determination that the Council did face an economic downturn. (Tr. 320:15-19). As such, the Council will only discuss why the Council determined the Charging Parties' brought the lowest value to its members.

He was initially hired to do compliance work, but really struggled with that. (Tr. 379:25-381:3 – ["he was just failing miserably at the prevailing wage compliance."]). Mr. Plascencia's ability to get compliance agreements from his prevailing wage work for the Council was not memorable to both Frank Hawk and Mr. Plascencia. (Tr. 382:4-7; Tr. 769:7-770:4 ["I don't remember, Your Honor."]). Frank Hawk then gave him a "shot at [grievance] because he was struggling with the compliance, and it just didn't work out." (Tr. 375:15-16). He failed at that too. For example, his inability to handle the Arenas, Parks, & Stadium's grievance resulted in it being taken from him. (Tr. 374:20-375:6; Tr. 639:2).

Plascencia was also given opportunities to help with various committees. He failed with the Sisters and the Brotherhood committee, (Tr. 386:12-387:2), and was also taken off the mentoring committee. Plascencia claim that the pandemic ended the mentoring committee is questionable, (Tr. 732:22-23), since no other committees ended because of the pandemic.

c. Hail's Comparative Performance

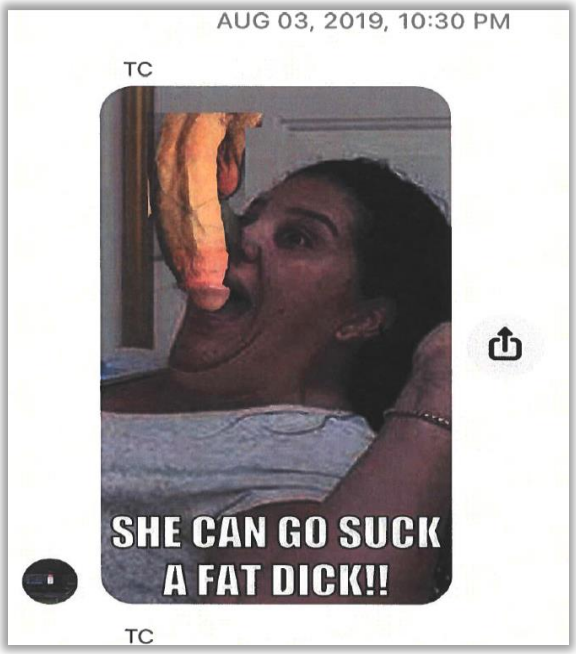
Hail, similarly, failed at various positions. He failed to adequately perform when he was tasked to putting together for the INSTALL program. Zero people showed up at the meeting. (Tr. 358:5-11). It was a complete failure, and this responsibility was taken from him. (Tr. 358:17-21). Hail's stripping experience was also inadequate. Throughout his three and half years with the Council, he stripped one worker. (Tr. 360:16-18). Even then, it cannot be considered his achievement alone because Chris Hopkins did most of the work by identifying the workers and collecting their phone numbers. All Hail had to do was to call a worker to join the union. (Tr. 360:20-361:6).

The GC claims that Hail was selected "for layoff because of Hail's visible tattoos" without any supporting citation. This is a blatant misrepresentation of Frank Hawk's testimony. Frank had testified that when he decided to hire Hail, he had informed Hail of his limitations because of his tattoos: "the day I hired him, I told him, I says, you're going to struggle because I can't send you in to talk to the CEO of MGM International." (Tr. 356:1-22). Hail did not overcome his limitations when he failed to specialize in the niches that afforded him the opportunity succeed. "So it became that he was just doing data collection. And that's what we would train somebody as maybe their first 90 days." (Tr. 361:25-362:5). In other words, he was doing work that everyone was expected to do.

In addition to his underperformance, Hail's misconducts and anger issues also impacted Frank Hawk's decision. For example, Frank Hawk was not impressed with Hail's use of the Carpenters organization in addressing a personal issue. The GC did not except to the ALJ's finding that

> Hail believed the leader of his daughter's Girl Scout troop had been very unfair in her dealings with Hail's wife and daughter. On August 3, 2019, on the Carpenters' social media Facebook page, he appealed to fellow Union members to render assistance to his family in this dispute by disparaging the woman's animal grooming service on Yelp. At least one Union member did so.

(ALJD, p.3, n.3). To claim it as a "vaguely described dispute" between Hail and a local Girl Scout group is to ignore the evidence in the record. Exhibit 70 is evidence of how he used his association with the Carpenters Union to slander and urged others to slander a girl scout's leader:



[12]

Frank Hawk was, understandably, displeased with this involuntarily association of the Carpenters union with such inappropriate and offensive behavior.

In sum, the record supports the Council's reason that the Charging Parties brought the least value to the union members. It was not a false reason and was a major factor in Frank Hawk's determination. There is no evidence of pretext and contending that these incidents over the years

[12] It is almost comical to call this a "vaguely described dispute" on the one hand, and, on the other hand, claim that Mike's hand gesture is evidence of animus.

was not enough for the Council to "view their work performance as deficient" is to inappropriately ask the Board to question the Council's business decisions. *Retlaw Broad. Co*., 310 NLRB at 992 ("This is so because it is the subjective motivations of Respondent which are in dispute not the reasonableness of the decisions made.").

IV. Conclusion

In short, the GC failed to adequately produce evidence to show that the decision to layoff the Charging Parties was made in April 2020. This decision was made before "any of the alleged protected activity," which negates any claim of animus. Without establishing animus, the GC cannot establish that animus motivated the decision. Accordingly, the ALJ correctly determined that the "GC did not establish that [the Council] laid off Plascencia and Hail as the result of their protected concerted activities in any material part." The Council respectfully requests the Board to affirm the ALJ's decision.

Dated: October 1, 2021

Respectfully Submitted,

/s/ Daniel M. Shanley
Daniel M. Shanley, Esq.
Judy Kang, Esq.
SHANLEY, Attorneys at Law
Attorneys for Respondent Southwest Regional Council of Carpenters

STATEMENT OF SERVICE

I hereby certify that copies of RESPONDENT'S SOUTHWEST REGIONAL COUNCIL OF CARPENTERS ANSWERING BRIEF TO EXCEPTIONS have been submitted by e-filing to the Executive Secretary of the National Labor Relations Board on October 1, 2021.

The following parties were served with a copy of said document by e-mail on October 1, 2021.

Mathew Sollett, Counsel for the General Counsel
National Labor Relations Board, Region 21
312 N. Spring Street, 10th Floor
Los Angeles, CA 90012
mathew.sollett@nlrb.gov

Kyle Hail
Email: kylehail@hotmail.com

Salvador Plascencia
Email: splv2011@gmail.com

Respectfully submitted,

/s/ Daniel M. Shanley
Daniel M. Shanley
Judy Kang, Esq.
SHANLEY, Attorneys at Law
Attorneys for Respondent Southwest Regional Council of Carpenters